Supreme Court, U.S.
FILED

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No. (1)

09-27 JUL 1 - 2009

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IN THE

SUPREME COURT OF THE UNITED STATES

TODD ANTHONY HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether petitioner, facing a doubling of the mandatory minimum ten year term of imprisonment for a drug conviction, based on a questioned state drug prior, is entitled to demand that the government prove the prior conviction beyond a reasonable doubt, as provided for in 21 U.S.C. § 851(c), thereby ensuring the mandatory enhancement is proven in strict compliance of the statute and in accordance with due process?

PARTIES TO THE PROCEEDINGS

Petitioner (appellant below) is Todd Anthony Hernandez.

Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Todd Anthony Hernandez ("Hernandez") respectfully petitions for a writ of certiorari to review the memorandum judgment of the United States Court of Appeals for the Ninth Circuit denying his appeal entered February 24, 2009 and denying his petition for rehearing and petition for rehearing en banc entered on April 3, 2009, pursuant to Rule 10 of the Rules of the Supreme Court.

CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

The unpublished judgment of the Court of Appeals for the Ninth Circuit issued on February 24, 2009 affirming Hernandez' convictions is attached hereto as the Appendix ("App.") 1. The unpublished order of the Court of Appeals for the Ninth Circuit issued April 3, 2009 denying Hernandez a rehearing and rehearing en banc is attached as App. 6.

JURISDICTION

The Court of Appeals' judgment was entered on February 24, 2009. A timely petition for rehearing and petition for rehearing en banc was denied on April 3, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution as well as the provisions of the federal statute concerning the enhanced punishment accorded to a defendant based on a prior felony drug offense conviction pursuant to 21 U.S.C § 851. Those provisions are supplied in App. 57, et. seq.

STATEMENT OF THE CASE

Hernandez was indicted in the District of Hawaii on May 18, 2005 alleging in count 1 that during the period from about 2002 through on or about February 25, 2005 he conspired with Gordon Lee Cox, II, and others, to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. §§ 846. 841(a)(1) and 841(b)(1)(A). Count 2 charged Hernandez with distributing on or about February 25, 2005 500 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) and 18 U.S.C. § 2. App. 8-9.

On June 15, 2005 the government filed a special information ("information") of a prior drug conviction pursuant to 21 U.S.C. § 851 alleging Hernandez was subjected to increased punishment pursuant to 21 U.S.C. § 841(b)(1)(A), upon conviction, since he had previously been convicted of the felony drug crime of illegally financing and investing funds (U.S. currency) intended to further the commission of the offense of possession of over 50 pounds of marijuana on or about August 31, 1990

in violation § 481.126 of the Texas Controlled Substances Act, Penal Code. The information alleged Hernandez was sentenced to probation on this conviction on November 4, 1993. App. 10-11. Attached to the information were 16 pages of the record of the Texas case.[1]

Hernandez was convicted by jury on both counts of the indictment on September 9, 2005. Hernandez filed several objections, before and after trial, to the district court considering the Texas conviction as a predicate drug offense for mandatory enhancement purposes. On May 6, 2007 Hernandez objected that the Texas conviction showing a conviction for "illegal investment" was not a drug offense, arguing that 1) the government's burden of proof on any issue of fact to establish the existence of the drug prior was "beyond a reasonable doubt," as required under 21 U.S.C. § 851(c)(1); 2) the Texas record relied on hearsay, unreliable evidence; 3) judicial notice must be not be taken of the Texas records for the truth of the facts asserted therein; 4) the Texas record was inconsistent and contradicting regarding precisely which part of Texas Health and Safety Code § 481.126 Hernandez was convicted of and that one subsection of the statute is not a drug offense; 5) the Texas statute is ambiguous since it includes conduct (mere spending funds which were derived from the commission of a drug offense) which is not a drug offense; 6) there is no comparable federal offense of spending (or possessing) funds derived from a drug offense; 7) he was given no notice this conviction

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1. The first 5 pages of the exhibit are reproduced in the Appendix; the remainder are not relevant to this petition. App. 12-18.

would or could act as a prior drug offense for sentencing enhancement purposes.; and 8) the rule of lenity in his favor should apply when there is any doubt. App.19-32.[2]

On June 7, 2007 Hernandez objected that 1) the Fifth Circuit cases addressing the Texas statute only dealt with § 481.126(a)(2) and none dealt with § 481.126(a)(1); the government's burden of proof to establish the prior conviction as a drug offense was beyond a reasonable doubt; 3) there were no jury instructions, jury's factual findings, a transcript of a plea colloquy or written plea agreement or Hernandez' assent by adoption or other affirmative conduct by him that the Texas conviction was to a felony drug offense; 4) the passage of over 15 years coupled with the incomplete Texas court file would cause the federal court to guess or speculate as to what occurred in Texas and failed to meet a rigorous standard mandating proof be established beyond a reasonable doubt; 5) the government-supplied documents were not reliable, were internally inconsistent and inaccurate; and 6) the government's speculative argument at to what must have occurred in Texas was made without foundation. App. 33-42 .

On July 23, 2007 the government submitted additional parts of the Texas record including a charge to the jury. App. 43-54.

After reviewing the documents and arguments, the district court found the Texas prior to be a felony drug

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2. In pleadings and declaration, Hernandez denied he was convicted in Texas of the drug crime of "illegal investment." App. 22-23.

conviction and increased the mandatory minimum sentence from ten to twenty years; he received a total of 262 months. App. 57-59. Hernandez' timely appeal to the Ninth Circuit Court was pursuant to 28 U.S.C. § 1291.

ARGUMENT

REASONS WHY THE WRIT SHOULD BE GRANTED

Despite Hernandez' repeated request that the court determine whether there existed proof beyond a reasonable doubt to establish whether his Texas conviction was a drug conviction for mandatory enhancement purposes, the Ninth Circuit refused to make a determination. This refusal conflicted with not only the statutory mandate of 21 U.S.C. § 851(c) that such a finding be made, but also is in conflict with decisions of other courts of appeals on the same important matter. Review is also necessary in that the court of appeals refused to rule on the issue, despite Hernandez' specific request that it do so (both in his briefs and petition for rehearing), thereby denying him due process under the Fifth Amendment; this refusal was such a far departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory power and conflicts with relevant decisions of this Court. Finally, the evidence and quantum of evidence necessary to establish proof beyond a reasonable doubt involves an important question of federal law that has not been, but should be, settled by this Court.

I. THE COURT OF APPEALS FAILED TO APPLY THE STATUTORILY MANDATED STANDARD OF PROOF BEYOND A REASONABLE DOUBT IN FINDING HERNANDEZ SUFFERED A PRIOR TEXAS DRUG CONVICTION.

Any person who commits a violation of an applicable federal drug law after a prior conviction for a felony drug offense which has become final shall be sentenced to not less than twenty years and not more than life imprisonment. 21 U.S.C. § 841(b)(1)(A). The government alleged Hernandez was subject to this increased mandatory minimum punishment by virtue of a more than thirteen year-old Texas "drug" conviction. A felony drug offense is an offense that is punishable by imprisonment for more than one year under any law of a state that prohibits or restricts conduct relating, *inter alia*, to marihuana. 21 U.S.C. § 802(44).

Health & Safety Code § 481.126, at the time Hernandez was prosecuted in Texas, provided:

> (a) A person commits an offense if the person knowingly or intentionally:
>
> (1) expends funds the person knows are derived from the commission of an offense under Section 481.112(c), 481.113(c), 481.114(c), 481.115(c), 481.116(c), 481.117(c), 481.120(c), or 481.121(c); or

(2) finances or invests funds the person knows or believes are intended to further the commission of an offense listed in Subdivision (1). Texas Health & Safety Code § 481.126 (West 1990).

While § 481.126(a)(2) has been found to be a drug offense, no opinion has found § 481.126(a)(1) to be a drug offense. *United States v. Cruz*, 882 F.2d 922, 924 (5th Cir. 1989). Subsection 481.126(a)(1) cannot be considered a drug offense as it proscribes the expenditure of funds by one who knows they are derived from the commission of drug violations. There is no comparable federal crime of spending drug-generated funds.[3]

Hernandez at all stages objected to a finding that this was a conviction under § 481.126(a)(2), arguing that the proof provided by the government was without foundation and lacking sufficient indicia of reliability. Indeed, the proof offered by the government did not rise to the level of the types of proof required by this Court in ACCA cases where there was *no* requirement that proof be

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3 Title 21 U.S.C. § 854 makes it unlawful for any person who has received income derived in violation of either subchapter of that chapter to use or invest, directly or indirectly, any part of such income where such person has participated as a principal within the meaning of section 2 of Title 18 to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce.

established beyond a reasonable doubt. *Shepard v. United States*, 544 U.S. 13, 20-21 (2005). Sufficient proof, according to *Shepard* for ACCA enhancement purposes, would be a statement of the factual basis for the charge, as shown by a transcript of plea colloquy, or by record of comparable findings of fact adopted by the defendant upon entering the plea. Here, the government failed to produce a transcript of a plea colloquy or a comparable statement to which Hernandez assented or adopted. Evidence which is insufficient to establish a lesser level of proof as in *Shepard* cannot be sufficient to establish a higher level of proof, as here.

Title 21 U.S.C. § 851 is the only one enhancement statute requiring that the standard of proof must be "beyond a reasonable doubt":

> (c)(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information....The court shall hold a hearing to determine any issues raised by the response which would except the person from the increased punishment. .... The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and

conclusions of law.

> (2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response....

21 U.S.C. § 851(c).

To prove the 21 U.S.C. § 851 enhancement the government introduced the Texas indictment alleging the offense of "illegal investment" to further the commission of the offense of possession of over 50 pounds of marihuana. App. 13. No subsection of § 481.126 was alleged.

An instruction to the jury stated that Hernandez was "charged by indictment with the offense of illegal investment" and "[t]o these charges the defendant has entered his plea of guilty. He has persisted in entering his plea of guilty, notwithstanding that the court, as required by law, has admonished him of the consequences. It plainly appearing to the court that the defendant is mentally competent, and that he makes this plea freely and voluntarily, his plea is by the court received. You are instructed to find the defendant guilty as charged in the indictment and assess his punishment." App. 45-46.

The judgment stated that the conviction was for "Illegal Investment (481.126)" by way of a plea of guilty to the court and a jury verdict of guilty. App. 14. The date of the judgment was November 4, 1993; however, the judgment was not signed by the court until over 30 days later on December 7, 1993. App. 18. There is nothing in these documents to establish the dates on when any of writings were prepared.

Hernandez argued that these documents failed to establish the prior conviction beyond a reasonable doubt. A judgment for § 481.126 is insufficient proof to establish a conviction for § 481.126(a)(2). A formulaic recitation in the judgment, signed and prepared 37 days *after* the court proceedings, was inconsistent and therefore unreliable, since it recited in its pre-printed form facts which the instruction to the jury proved were not correct: a pre-printed portion of judgment recited that Hernandez had pleaded not guilty and the jury heard the evidence before finding him guilty. To the contrary, the jury instruction, if it were to be believed, recited that before the jury received the case Hernandez had pleaded guilty and its function was to determine the sentence. App. 46. These forms could not be both correct; they carried with them an internal inconsistency leading to an abiding conviction there was reasonable doubt as to the conviction Hernandez suffered. The fact that the judgment was not even signed until 37 days after November 4, 1993 provides no credible support for its findings, as they were not contemporaneously made and entered when the events occurred. Further, there is no proof that the typed-in portions of the judgment were also done until 37 days after the day in court.

In sentencing enhancement cases, where the standard of proof is not set out by statute (like here), this Court has demanded even *more* proof than was offered here. Under 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA), the sentencing court must look to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard, supra*, 544 U.S. at 20-21. Lower courts have long-applied a lesser standard for proof of prior convictions in ACCA cases, which is indisputably not the standard required in § 851(c).[4]

Like the ACCA cases, a lesser standard of proof is applied for aggravated felony enhancements after an 8 U.S.C. § 1326 conviction. *United States v. Corona-Sanchez*, 291 F.2d 1201, 1211-12 (9th Cir. 2002)(en banc)(judicially noticeable facts must "clearly establish" the prior conviction); *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004)(same); *United States v. Valle-Montalbo*, 474 F.3d 1197, 1200, 1201-02 (9th Cir.

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4. *See, e.g., United States v. Potter*, 895 F.2d 1231, 1237-38 (9th Cir. 1990)(defendant's argument government must prove prior conviction beyond a reasonable doubt rejected; even though consequences to defendant are "severe", "clearly reliable" evidence is sufficient to meet government's burden); *United States v. Franklin*, 235 F.3d 1165, 1170 (9th Cir. 2000)(judicially noticeable facts must "clearly establish" the predicate offense).

2007)(defendant's argument that prior conviction must be proven beyond a reasonable doubt rejected; "clear and convincing" evidence is sufficient). Similarly, in applying the career offender enhancement under the United States Sentencing Commission Guidelines, the same lesser standard of proof is applied. *United States v. Sandoval-Venegas*, 292 F.3d 1101, 1106, 1108 (9th Cir. 2002)("clearly establish").

Despite Hernandez' seeking a ruling on whether the government's proffered evidence was sufficient factually to establish a drug offense beyond a reasonable doubt, the Court of Appeals found it "abundantly clear" the conviction was for § 481.126(a)(2) and that it "categorically qualifies as a 'felony drug offense.'" The court found that looking at the statute "as a whole" it would "conclude" the conviction was for "illegal investment." App. 4.

In his petition for rehearing Hernandez objected to the decision, arguing he had a right to have the issues he raised be determined in his appeal; to deny him this right would deny him due process.

In response, the Court of Appeal rejected the petition for rehearing and inserted in its opinion a footnote 1 holding that Hernandez, pursuant to 21 U.S.C. § 851(c) and (e), could not deny any allegation of the information of prior conviction or claim it was invalid. The court ruled that Hernandez could still argue "as a matter of law" that his conviction was not a felony drug offense without avail. The court specifically rejected Hernandez' "suggestion" that it apply the "'beyond a reasonable doubt'

standard applicable to factual findings under 21 U.S.C. § 851(c). The court gave no reason why it refused to apply the reasonable doubt standard or why the government was released from its burden of proving any issue of fact beyond a reasonable doubt. App. 6-7.

The Court of Appeals ruling violated due process. The court limited Hernandez to a "matter of law" argument despite the fact he factually challenged the Texas documents. By referring to 21 U.S.C. § 851(e), the court viewed the issue to be an untimely challenge to the conviction's validity. Hernandez did not challenge the validity of a conviction; he challenged whether the evidence offered by the government, considered against his evidence, proved beyond a reasonable doubt the existence of a felony drug offense.

The ruling conflicts with decisions of this Court since it "substantially reduces" the government's burden of proof beyond a reasonable doubt to no burden at all. *Cool v. United States*, 409 U.S. 100, 104 (1972)(per curiam); *In re Winship*, 397 U.S. 358, 364 (1970). The ruling conflicts with this Court which has held that when an appellant raises a specific issue he has an absolute right to a decision on the merits. *Carafas v. LaVallee*, 391 U.S. 234, 241-42 (1968); *Garrison v. Patterson*, 391 U.S. 464, 466 (1968).

The Court of Appeals' ruling in determining this is a "matter of law", as opposed to a disputed fact determination, does violence not only to § 851(c)(1)'s rules regarding a hearing and the burdens of each party in producing evidence, but goes against all other cases which

have viewed the determination to be resolution of an issue of fact. In *Shepard*, the same factual weighing of documents was recognized: "the Court of Appeals resolved this *contested factual matter* by ordering the District Court to impose the enhancement on remand." 544 U.S. at 27.(THOMAS, J., concurring in part and concurring in judgment)(italics supplied).

By assuming the issue to be decided to be one of law, the Court of Appeals ignored considering and weighing the evidence offered, including Hernandez' factual denial of the conviction as a drug offense. In *Shepard*, the court documents were evidence to be considered-facts- and not considered "matters of law." 544 U.S. at 18-19. Hernandez was entitled to a reasoned, articulated decision.

The Ninth Circuit Court of Appeals is in conflict with other Courts of Appeal on this important question of federal and Constitutional law.

In *United States v. Green*, 175 F.3d 822 (10th Cir. 1999), the Court of Appeals reviewed documents filed in two cases (and the defendant's written denial) finding the government's use of them unpersuasive to its statutorily mandated burden to establish the convictions beyond a reasonable doubt. *Green*, 175 F.3d at 834-36. Unlike the Ninth Circuit, which made no attempt to view the evidence contained in the filed documents and Hernandez' opposing evidence, the Tenth Circuit noted that "reasonable doubt" is "a doubt that would cause a reasonable person to hesitate to act," citing *Victor v. Nebraska*, 511 U.S. 1, 20 (1994). In order to convict on this standard, the fact

finder should have "an abiding conviction as to guilt". This standard of proof is intended to convey "the very high level of probability [of guilt] required by the Constitution in criminal cases." *Victor*, 511 U.S. at 14. *Green* reversed the district court's findings, noting the government's "bare evidence may be sufficient for a rational trier of fact to so find under a preponderance of the evidence standard, but that is not the issue here." *Green*, 175 F.3d at 835. To highlight the stark distinction in burdens of proof, *Green* cited *Winship, supra*, 397 U.S. at 367, which rejected a contention that there is "'"tenuous difference"'" between the reasonable doubt and the preponderance standards." *Id.*

In *United States v. Kellam*, ___ F.3d ___, 2009 U.S.App. LEXIS 11844 (4th Cir. 2009), the Circuit Court found the government failed in its burden to establish beyond a reasonable doubt that three prior felony drug offenses should be linked to the defendant, who also never admitted he had been previously convicted of those offenses. *Kellam* cites Fifth, Seventh and Eighth Circuit decisions also correctly applying the reasonable doubt standard to prior drug convictions. *Id.* at 13-14. The Ninth Circuit failed in considering the reasonable doubt standard.

If there is any doubt in the record due to the lack of documentation, such doubt must be resolved against the government which bore the burden of proof. Reliance on thirteen year-old records, or speculation as to what missing records should prove, is not appropriate when considering proof to establish a draconian doubling of the mandatory minimum sentence. The "passage of time should dilute-and not magnify-the effect of past conduct on punishment

for present acts. *United States v. Parker*, 5 F.3d 1322, 1328 (9th Cir. 1993). If there is any ambiguity in the evidence offered by the government to meets its burden, such doubt must be resolved in favor of the defendant. The rule of lenity requires the Court "to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Bell v. United States*, 349 U.S. 81, 83 (1955).

CONCLUSION

A writ of certiorari should issue to review the important issues raised herein..

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-10428
D.C. No. CR-05-00196-SOM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TODD ANTHONY HERNANDEZ,
Defendant-Appellant.

MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Susan Oki Mollway, District Judge, Presiding

Argued and Submitted February 9, 2009
Honolulu, Hawaii

Before: REINHARDT, BRUNETTI and THOMAS, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Todd Anthony Hernandez ("Hernandez") was convicted in the United States District Court, District of Hawaii, of conspiring to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A) and 18 U.S.C. § 2. Hernandez received an enhanced sentence of 262 months on each count, to be served concurrently. This appeal followed, and we affirm.

We find no error in the district court's denial of Hernandez's motion to dismiss the indictment on account of government misconduct. First notwithstanding any alleged perjured testimony before the grand jury, there was "sufficient non-perjurious testimony ...to support the indictment," and therefore dismissal on that ground was not justified. *See United States v. Claiborne*, 765 F.2d 784, 791 (9th Cir. 1985), *abrogated on other grounds, Ross v. Oklahoma*, 487 U.S. 81 (1988). Nor was dismissal warranted by the government's failure to provide the grand jury with all available impeachment evidence, as "prosecutors have no obligation to disclose 'substantial exculpatory evidence' to a grand jury, even if that evidence impeaches the credibility of a key witness." *United States v. Haynes*, 216 F.3d 789, 798 (9th Cir. 2000) (citing *United States v. Williams*, 504 U.S. 36, 51-55 (1992)). Second, the government's failure to produce certain investigative reports did not violate Brady v. Maryland, 373 U.S. 83 (1963), because Hernandez failed to make any showing that these reports were material. Third, the prosecutor's characterization of reasonable doubt during his closing argument was not

ground for dismissal because, after defense counsel's untimely objection, the court provided and adequate curative instruction. If there was error, it was harmless.

The district court also correctly rejected Hernandez's next argument-that his Sixth Amendment rights were violated on account of ineffective assistance of trial counsel. Counsel was not ineffective in failing to seek dismissal of the indictment on the basis of a Speedy Trial Act violation because there was no such violation: Hernandez's trial commenced well within the required 70 days from his first appearance before a judicial officer in the charging district of Hawaii. See 18 U.S.C. § 316(c)(1). Nor was trial counsel ineffective in withdrawing a request for a *Franks* hearing to challenge the affidavit supporting the search of Hernandez's residence. Putting aside the statements allegedly made with reckless disregard for the truth, the remainder of the affidavit was still more than adequate to establish probable cause. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). As to the miscellaneous alleged deficiencies in counsel's performance that were mentioned only in passing in the opening brief, Hernandez has been unable to show that he was prejudiced by any of his attorney's actions. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Finally, the district court did not err in enhancing Hernandez's sentence pursuant to 21 U.S.C. § 841(b)(1)(A), on account of his "prior conviction for a felony drug offense." The certified copies of the record of Hernandez's prior conviction, including the indictment, abstract of judgment, jury instructions, and

jury verdict form, make abundantly clear that Hernandez was convicted in 1993 of "illegal investment" under Tex. Health & Safety Code § 481.126(a)(2) (West 1990).[1]

Applying the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990), we conclude that the statutory definition of "illegal Investment" categorically qualifies as a "felony drug offense" for purpose of a sentence enhancement. *See United States v. Navidad-Marcos*, 367 F.3d 903, 907 (9th Cir. 2004). The crime of illegal investment is defined as "knowingly or intentionally... financ[ing] or invest[ing] funds the person knows or believes are intended to further the commission" of an enumerated drug offense, Tex. Health & Safety Code § 481.126(a)(2) (West 1990), and is punishable by imprisonment for five years to life. Tex. Health & Safety Code § 481.126(b) (West 1990). A "felony drug offense" is defined as "an offense that is punishable by imprisonment for more than one year under any law of...a State... that prohibits or restricts conduct relating

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1. Even if the statute of conviction was Tex. Health & Safety Code § 481.126 as a whole, rather than subsection (a)(2), we would still conclude, by looking to the record of conviction under the modified categorical approach, that the conduct for which Hernandez was convicted constitutes "illegal investment." *See Shepard v. United States*, 544 U.S. 13, 17 (2005); *Taylor v. United States*, 495 U.S. 575, 602 (1990); *United States v. Snellenberger*, 548 F.3d 699, 702 (9th Cir. 2008).

to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44). The Texas statute is punishable by more than one year; it arises under the law of the State of Texas; and it prohibits conduct (the investment of funds) relating to (to further the commission of) a drug offense. CF. United States v. Martinez, 182 F.3d 1107, 1113 (9th Cir.1999).[2] We conclude, therefore, that Hernandez's 1993 conviction was a "prior conviction for a felony drug offense," which justifies the enhancement of his sentence under 21 U.S.C. § 841(b)(1)(A).

The judgment of the district court is, for all of these reasons, **AFFIRMED.**

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2. Our conclusion is corroborated by Fifth Circuit case law holding that section 481.126(a)(2) is, categorically, a "controlled substance offense." United States v. Cruz, 882 F.2d 922, 924 (5th Cir. 1989); *see also United States v. Rinard*, 956 F.2d 85, 88 (5th Cir. 1992). As a "felony drug offense" covers more conduct than a "controlled substance offense," *see United States v. Sandle*, 123 F.3d 809, 812 (5th Cir. 1997), section 481.126(a)(2) would logically be a "felony drug offense" under Fifth Circuit law, as well.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-10428
D.C. No. CR-05-00196-SOM
District of Hawaii,
Honolulu

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TODD ANTHONY HERNANDEZ,
Defendant-Appellant.

ORDER

Before: REINHARDT, BRUNETTI and THOMAS, Circuit Judges.

The memorandum disposition filed February 24, 2009, is hereby amended as follows:

5. At page 4, line 3, after <drug offense.">, insert footnote 1. The text of the footnote shall read: <Because the statute of limitations has run, *see* 21 U.S.C. § 851(c). Hernandez nonetheless may argue that his prior conviction, as a matter of law, does not constitute a conviction of a "felony drug

offense." For the reason set forth above, we disagree. We do not, moreover, despite defendant's suggestion, apply the "beyond a reasonable doubt" standard applicable to factual findings under 21 U.S.C. § 851(c).>

With this amendment, the panel has unanimously voted to deny the petition for panel rehearing. Judges Reinhardt and Thomas have voted to deny the petition for rehearing en banc, and Judge Brunetti has so recommended. The full court has been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

No subsequent petition for rehearing or for rehearing en banc may be filed in this matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)
	) CRIM. NO.
Plaintiff,	) CR05-00196
	) SOM
vs.	)
	) INDICTMENT
TODD ANTHONY HERNANDEZ,	) [21 U.S.C. 864
	) 841 (a)(1), 841
Defendant.	) (b)(1)(A)]
	)

INDICTMENT

Count 1:

The Grand Jury charges that:

During the period in or about 2002 up through and including on or about February 25, 2005 in the District of Hawaii and elsewhere, defendant TODD ANTHONY HERNANDEZ knowingly and intentionally conspired with Gordon Lee Cox, II (the latter not being charged as a defendant herein), and others known and unknown to the grand jury, to distribute and to possess with intent to distribute five-hundred (500) grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, and salts of its isomers, a Schedule II controlled substance.

In violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841 (b)(1)(A).

Count 2:

The Grand Jury further charges that:

During the period on or about February 25, 2005 to on or about March 10, 2005 in the District of Hawaii and elsewhere, defendant TODD ANTHONY HERNANDEZ knowingly and intentionally distributed five-hundred (500) grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, and salts of its isomers, a Schedule II controlled substance.

In violation of Title 21, United States Code, Sections 841 (a)(1) and 841 (b)(1)(A), and Title 18, United States Code, Section 2.

DATED: Honolulu, Hawaii, May 18, 2005.

/s/ Grand Jury Foreperson
GRAND JURY FOREPERSON

EDWARD H. KUBO, JR..
United States Attorney

By /s/ Florence T. Nakakuni
FLORENCE T. NAKAKUNI
Assistant U.S. Attorney

/s/ Michael K. Kawahara
MICHAEL K. KAWAHARA
Assistant U.S. Attorney

USA v. Hernandez, USDC-Hawaii, Indictment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	) CR. NO. 05-0196SOM)
Plaintiff,	) SPECIAL INFORMATION) AS TO PRIOR DRUG
vs.	) CONVICTION OF
TODD ANTHONY HERNANDEZ,	) DEFENDANT) PURSUANT TO TITLE 21
Defendant.	) UNITED STATES CODE,) SECTION 851; EXHIBIT) "1"

SPECIAL INFORMATION AS TO PRIOR DRUG CONVICTION OF DEFENDANT PURSUANT TO TITLE 21, UNITED STATES CODE, SECTION 851

TO THE HONORABLE JUDGE OF THE ABOVE-CAPTIONED COURT:

Please take notice that the United States proposes to rely on a prior conviction of defendant above-named in support of its claim that said defendant is subject to increased punishment by reason thereof pursuant to Title 21, United States Code, Sections 841 (b)(1) and 851, as amended, as follows: as indicated in the pleadings contained in attached Exhibit "1", in that criminal case entitled State of Texas v. Todd Anthony Hernandez, File No. 60927-327, in the District Court of El Paso County, State of Texas, defendant was

convicted of the felony crime of illegally financing and investing funds (U.S. currency) which were intended to further the commission of an offense, to wit: the possession of over fifty (50) pounds of marijuana, said offense occurring on or about August 31, 1990, in violation of Section 481.126 of the Texas Controlled Substance Act, Penal Code. Defendant was initially sentenced on November 4, 1993 to ten (10) years probation and a fine of $200,000. On September 26, 1997, defendant's probation was revoked and he was re-sentenced to five years imprisonment and a fine of $50,000.

This felony drug conviction is final at this time, and was also final as of the time that defendant committed the Federal criminal offenses charged in the above-captioned action in this Court.

DATED: Honolulu, Hawaii, June 15, 2005.

EDWARD H. KUBO, JR.
United States Attorney

By /s/ Michael K. Kawahara
MICHAEL K. KAWAHARA
Assistant U.S. Attorney

FILE NO. 60927-327

THE STATE OF TEXAS

VS.

TODD ANTHONY HERNANDEZ

OFFENSE:
ILLEGAL INVESTMENT

Filed the___day of APR 23, 1991, 19____
EDIE RUBALCABA; District Clerk, 327
Judicial District Court, El Paso County, Texas
By /s/ [Illegible] Deputy
Amount of Bail $ _____

THE STATE OF TEXAS
COUNTY OF EL PASO

I, EDIE RUBALCABA, District Clerk of the 327 Judicial District Court, El Paso County, Texas, do hereby certify that the above and the foregoing is a true and correct copy of the original Bill of Indictment now on file in my office.

In testimony whereof, I hereunto set my hand and official seal of said Court, this the _____ day of April 23, 1991, A.D. 19____.

EDIE RUBALCABA, District Clerk
327 Judicial District Court
El Paso County, Texas
By_____ Deputy____

IN THE NAME AND AUTHORITY OF THE STATE OF TEXAS

The Grand Jurors for the County of El Paso, State aforesaid, duly organized as such, at the JANUARY Term, A.D. 1991, of the 120th Judicial District Court for said County , upon their oaths in said Court, present that TODD ANTHONY HERNANDEZ on or about the 31st day of August, One Thousand Nine Hundred and Ninety and anterior to the presentment of this indictment, in the County of El paso and State of Texas, did then and there unlawfully, intentionally and knowingly finance and invest funds, to-wit: United States Currency, which the said TODD ANTHONY HERNANDEZ knew and believed were intended to further the commission of an offense, to-wit: Possession of marihuana over fifty pounds,
against the peace and dignity of the State.

/s/ [Illegible]
Foreman of the Grand Jury

A TRUE COPY I CERTIFY
Gilbert Sanchez District Clerk
By /s/ [Illegible] DEPUTY

No. 60927-327

THE STATE OF TEXAS	IN THE 327TH DISTRICT COURT
vs.	OF EL PASO
TODD ANTHONY HERNANDEZ	COUNTY, TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY PUNISHMENT FIXED BY JURY-PROBATION GRANTED

JUDGE PRESIDING VIRGIL MULANAX
DATE OF JUDGMENT NOVEMBER 4, 1993
ATTORNEY FOR STATE MAURICE KURLAND
ATTORNEY FOR DEFENDANT RUSSELL ABOUD
OFFENSE CONVICTED OF ILLEGAL INVESTMENT (481.126)
DEGREE FIRST
DATE OF OFFENSE COMMITTED AUGUST 31, 1990
CARGING INSTRUMENT:
INDICTMENT/INFORMATION
PLEA GUILTY TO THE COURT
JURY VERDICT GUILTY
FOREMAN GRACIELA OLIVAS
PLEA TO ENHANCEMENT PARAGRAPH(S)
N/A
ENHANCEMENT PARAGRAPH (2) N/A
FINDINGS ON USE OF DEADLY WEAPON N/A
PUNISHMENT ASSESSED BY JURY

DATE SENTENCE IMPOSED NOVEMBER 4, 1993
COSTS $104.50
PUNISHMENT AND PLACE OF CONFINEMENT
TEN (10) YEARS A/P (STRAIGHT)
DATE TO COMMENCE NOVEMBER 4, 1993
TIME CREDITED -0-
TOTAL AMOUNT $200,000.00
CONCURRENT UNLESS OTHERWISE
SPECIFIED N/A

This day this cause was called for trial and the State appeared by her District Attorney, and the said Defendant, TODD ANTHONY HERNANDEZ, appeared in person, HIS counsel also being present, and both parties announced ready for trial, the Defendant, TODD ANTHONY HERNANDEZ, having duly being arraigned and having pleaded "Not Guilty" to the charge contained in the Indictment herein; thereupon a Jury, to wit: GRACIELA OLIVAS and eleven others, was duly selected, impanelled and sworn, who having heard the Indictment read, and the Defendant, TODD ANTHONY HERNANDEZ, plea of Not Guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, the defendant, TODD ANTHONY HERNANDEZ, and HIS counsel being present, and in the form of law returned into Open Court the following verdict which was received by the Court and here now entered upon the Minutes of the Court, to wit:

THE STATE OF TEXAS

VS.

TODD ANTHONY
HERNANDEZ CAUSE NO. 60927-327

WE THE JURY, HAVING FOUND THE DEFENDANT GUILTY OF THE OFFENSE OF ILLEGAL INVESTMENT, AS ALLEGED IN THE INDICTMENT.

/s/ GRACIELA OLIVAS
PRESIDING JUROR

Whereupon, the Defendant having requested that the punishment be assessed by the same Jury, who, having heard the evidence offered with regard to punishment, and afterwards were brought into Open Court the following verdict, which was received by the Court and is here now entered upon the Minutes of the Court, to wit:

WE THE JURY, HAVING FOUND THE DEFENDANT, TODD ANTHONY HERNANDEZ, GUILTY OF THE OFFENSE OF ILLEGAL INVESTMENT, AS ALLEGED IN THE INDICTMENT, ASSESS HIS PUNISHMENT AT CONFINEMENT IN THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION FOR A PERIOD OF TEN (10) YEARS. WE FURTHER ASSESS A FINE OF $200,000.00

WE FURTHER FIND THAT THE DEFENDANT HAS NEVER BEEN HERETOFORE CONVICTED OF A FELONY IN THE OR ANY OTHER STATE, AND RECOMMEND THAT: ONLY THE CONFINEMENT BE SUSPENDED AND THAT THE FINE NOT BE SUSPENDED AND THAT DEFENDANT BE PLACED UPON ADULT PROBATION.

/s/ GRACIELA OLIVAS
PRESIDING JUROR

Cause No. 60927-327

NAME: TODD ANTHONY HERNANDEZ

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT: That the said Defendant, TODD ANTHONY HERNANDEZ, guilty of the offense of ILLEGAL INVESTMENT as found by the Jury, by confinement in the Penitentiary for TEN (10) years, and that the State of Texas do have and recover of the said Defendant, TODD ANTHONY HERNANDEZ, all costs in the prosecution expended, for which execution will issue: the imposition of the above sentence is suspended and the Defendant is placed on adult probation under the terms and conditions set out in Exhibit "A" hereto attached.

NOTICE OF APPEAL
A TRUE COPY, I CERTIFY
GILBERT SANCHEZ, District Clerk
/s/ by Deputy
DEPUTY

/s/ Virgil Mulanax
PRESIDING JUDGE
VIRGIL MULANAX

12-7-93
DATE SIGNED

_____
APPROVED AS TO FORM

_____
APPROVED AS TO FORM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	) CRIM. NO. 05-0196) SOM
Plaintiff,	)
v.	)
	) DEFENDANT'S) SUPPLEMENT TO
TODD ANTHONY HERNANDEZ,	) OBJECTIONS TO) PRESENTENCE) REPORT, OBJECTIONS
Defendant.	) TO STATUTORY) ENHANCEMENT) SENTENCING
	) STATEMENT AND, MOTION FOR DOWNWARD DEPARTURE

DEFENDANT'S SUPPLEMENT TO OBJECTIONS TO PRESENTENCE REPORT, OBJECTION TO STATUTORY ENHANCEMENT, SENTENCING STATEMENT, AND MOTION FOR DOWNWARD DEPARTURE

Defendant Todd Anthony Hernandez, by and through his attorney Philip A. DeMassa, of Philip A. DeMassa APC, files the enclosed Supplement To Objections to his Presentence Report (hereinafter "PSR"), a further Objection to the Statutory

Enhancement, a further Sentencing Statement, and a Motion for Downward Departure.

* * *

II

SINCE DEFENDANT DID NOT SUFFER A PRIOR DRUG CONVICTION IN TEXAS IT SHOULD NOT BE CONSIDERED TO INCREASE THE MANDATORY MINIMUM SENTENCE TO TWENTY YEARS

Pursuant to Title 21 U.S.C. § 851(b), defendant denies he has been previously convicted of an applicable drug felony as alleged in the information. Upon the hearing as provided defendant pursuant to 21 U.S.C. § 851©)(1), the government has the burden of proving any issue of fact at the hearing beyond a reasonable doubt. *Ibid.*

The record shows the government, barely four weeks after indictment, filed a Special Information pursuant to 21 U.S.C. §§ 841(b)(1) and 851 alleging defendant, by virtue of his conviction of a "drug offense" in the District Court of El Paso County in the State of Texas, was now subject to a doubling of the ten year mandatory minimum sentence. The government appended to its Special Information various pleadings alleging the necessary facts and Texas statutory law necessary to qualify the conviction as a predicate "drug offense.". Docket 8.

The Texas District Court (state) documents reflect defendant was indicted April 23, 1991 for the

offense of "illegal investment." The indictment alleged that defendant on or about August 31, 1990 had intentionally and knowingly financed and invested funds believed to further the commission of possession of over fifty pounds of marijuana. Docket 8, Exhibit 1 at pp. 1-2.

On November 4,1993 a "Judgment on Jury Verdict of Guilty Punishment Fixed By Jury-Probation Granted" form was entered. In it, defendant was noted to have made a plea of "GUILTY TO THE COURT". The form noted, using pre-printed formulaic language, that there was a jury verdict of guilty and the punishment was assessed by the jury. The form noted that the "Offense Convicted of ILLEGAL INVESTMENT (481.126)." The form recited that a jury was impaneled, heard the evidence and returned a verdict that they had found defendant guilty of the offense of "illegal investment, as alleged in the indictment." The jury assessed punishment at 10 years but recommended it be suspended and the defendant be placed on probation. A $200,000 fine was assessed. Docket 8 at pp. 3-4.

The additional documents deal with the terms and conditions of probation and three documents referencing a "Judgment Revoking Probation." As will be seen below, these three revocation documents all recite defendant was convicted of "Illegal Investment TPC 481.126." and that : "On the 4th day of November, said defendant entered a plea of guilty in this Court to an indictment then pending charging said defendant with the offense stated above." Docket 8 at pp. 9, 12, 15.

Through previous counsel, defendant objected to the filing of the Special Information arguing that "illegal investment" is not a prior felony drug offense in the Ninth Circuit which would trigger the mandatory minimum 20 year penalty, there is no California state requirement that such conduct would require registration since it is not a "felony drug offense",[3] and that its application herein is unconstitutional. Docket 48 at pp 5-6 and Docket 53 at pp. 11-12.

Defendant reaffirms his previous arguments in addition to the following:

1. Defendant Does Not Concede The Texas Record Factually Establishes A Drug Felony.

Defendant does not concede that he was found guilty by a jury of "illegal investment" as alleged in the

---

3. Presumably, defendant was referring to California Health and Safety Code § 11590. There is no requirement for a person convicted of possession of monies obtained from drug offenses to register as such is not a "drug felony." The closest California statutes would be Healthy and Safety Code § 11370.6(a) or § 11370.9(b). However, neither are included within those statutes mentioned in § 11590 requiring that a defendant register after conviction. California Health and Safety Code § 11370.6(a) proscribes the possession of over $100,000 derived from, or intended to be used for, the sale, transportation, manufacture, offer for sale, offer to manufacture certain enumerated controlled substances found in §§ 11054, 11055, 11056, or 11058. California's marijuana statutes-Health and Safety Code §§ 11357-11361-are not included.

indictment. First, defendant noted in his pleading filed November 28, 2005 that he objected to such a finding: "Defendant was not found guilty by a jury verdict of illegal investment. Defendant picked a jury but accepted a plea and pled guilty without any evidence being taken. Defendant was sentenced by jury." Docket 48 at p. 3, PSR Addendum at 2A, Defendant's Objections to Draft PSR at p. 3.

Defendant further objects to the hearsay used in the conviction form that he was found guilty of "illegal investment" as alleged in the indictment. Although the court can take judicial notice of court records pursuant to Federal Rule of Evidence 201, it cannot do so when the accuracy of the fact is subject to reasonable dispute. Fed.R.Evid. 201(b). Here, defendant has denied, and continues to deny, that a jury heard evidence on his case and rendered a guilty verdict on the indictment. As will be seen below, there is a significant difference to pleading guilty to a statute encompassing conduct which was not drug related and pleading guilty to a statute proscribing solely drug offenses.. A "`court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it." *BP West Coast Products LLC v. Greene, 318 F.Supp.2d 987, 994 (E.D. Cal. 2004), citing M/V Am. Queen v. San Diego Marine Constr. Corp., 708 F.2d 1483, 1491 (9th Cir. 1983).* In considering prior court orders, the Court cannot take judicial notice of the documents for the truth of the facts asserted therein. *Ibid, see also, Guam Investment Co. v. Central Building, Inc., 288*

F.2d 19, 23 (9th Cir. 1961).

A court may take "judicial notice of another court's opinion ... [but] `not for the truth of the facts recited therein...'" *Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001)(citation omitted).*

Not only does defendant dispute the Texas jury both considered the evidence and made findings that the evidence supported the indictment, but there is available *contradicting* evidence to support defendant's position. As stated, the several probation revocations documents all note that "On the 4th day of November, said defendant entered a plea of guilty in this Court to an indictment then pending charging said defendant with the offense stated above." Docket 8 at pp. 9, 12, 15. This information makes it clear that any fact urged by the government is in "reasonable dispute" since the fact is not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. rule 201(b)(2).

Although it may be argued that defendant pled guilty to the "offense stated above," this does not, however, mean that he pled to the charge alleged in the indictment. Rather, the Judgment recited a plea to "Illegal Investment TPC 481.126." Defendant has no idea what "TPC" refers to. These events occurred either thirteen and a half or seventeen years ago. It is impossible to recall, much less speculate on precisely what occurred so long ago. One may assume these initials stand for Texas Penal Code. This, however, would not be correct. There is no Texas Penal Code

section 481.126 or similar section proscribing such conduct. Research indicates, as explicated in footnote 2 below, that the possible statute was Health and Safety Code § 481.126. The fact that there is an error in recitation as to what, if any, the statue was that defendant was dealing with is another argument that the Texas documents are unreliable and cannot be admitted against defendant. The documents must not be considered as they are inaccurate in referring to a non-existing Penal Code section. Further, even if considered, as will be seen below, the illegal investment statute encompasses conduct which would not constitute a drug felony, even under Fifth Circuit law or federal statutes.

2. The Texas Statute Is Ambiguous As It Proscribes Conduct Which May Or May Not Constitute a Drug Felony.

The Texas Health and Safety Code illegal investment section, 481.126 alleges conduct which, even under Fifth Circuit law or federal statutes, would not constitute a felony drug offense. The government argues that the statute is clearly a felony drug offense. It cites what it believes to be the applicable subsection of section 481.126. Response filed December 12, 2005 at pp. 3-4. This citation is incorrect and does not refer to the statute applicable to defendant's case *at the time*.

Texas Health & Safety Code § 481.126, in effect at the time of defendant's alleged conduct, provided that:

"(a) A person commits an offense if the person knowingly or intentionally:

(1) expends funds he knows are derived from the commission of an offense under Section 481.112©), 481.113©), 481.114©), 481.115©), 481.116©), 481.117©), 481.120©), or 481.121©); or

(2) finances or invests funds the person knows or believes are intended to further the commission of an offense listed in Subdivision 1."[4] (West 1990).

The statute proscribes two dramatically different types of conduct: conduct involving the *expenditure* of funds derived from conduct resulting from variously enumerated statutes *or* conduct involving *investing* so as to commit those enumerated crimes.[5]

It is clear that defendant *cannot* be considered to be convicted of a drug offense by spending funds. There is a huge difference between investing money to

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4. The earlier statute is discussed in Texas opinions. *Jordan v. State, 816 S.W.2d 89, 91 n 1 (1991); Tanner v. State of Texas, 838 S.W.2d 302, 303 n. 1 (1992); Stevens v. State, 817 S.W.2d 800, 803 (1991).* These cases deal with the applicability of § 481.126(a)(2), not the expenditure subdivision, § 481.126(a)(1).

5. The version of § 481.126 cited by the government also provides in subsection (a)(1) that a person shall not expend funds. Under any of the versions of § 481.126, defendant's analysis-that expending funds is not a drug offense-would be the same.

buy narcotics and spending proceeds. Nor is there any comparable federal statute which would punish a person with personal penal penalties for spending money as alleged in Texas Health & Safety Code § 481.126(**a**)(**1**). The government cites *United States v. Cruz, 882 F.2d 922 (5th Cir. 1989)* as support for its position. Setting aside defendant's disagreement that *Cruz'* legal analysis (e.g., that an illegal investment conviction under § 461.126(a)(2) would be a drug offense) would be the same in the Ninth Circuit, it is readily apparent that *Cruz* did *not* address ("we express no opinion") the issue of whether or not a conviction under subsection 1 [§ 481.126(a)(1)] would also be a drug felony for enhancement purposes.[6] *Cruz*, 882 F.2d at 924.

A further reason that the statute was not intended, nor understood, to be solely penal in nature is found in the fact it is in the Health and Safety Code and not the Texas Penal Code. There are many violations of the Health and Safety Code which do not carry penal punishment. Indeed, the very statue *sub judice*, § 481.126, is a perfect example. As noted, § 481.126(a)(1) proscribes conduct that could be charged criminally or civilly. Texas has used that subsection to seize currency it believed was derived from the illegal delivery of a controlled substance. In an applicable case, a traveler Willard Wayne Wilks' $11,014 was

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6. *Cruz* analyzed Tex. Rev.Civ. Stat.Ann. Art. 4476-15 § 4.052(a)(2) (Vernon Supp. 1989) which was the predecessor of Texas Health & Safety Code § 481.126(a)(2) (West 1990).

seized at an airport and unsuccessfully sought to be forfeited. Wilks himself was not charged with a criminal offense. *$11,014.00 v. State, 828 S.W.2d 814, 816 n. 2 (1992).* This is one correct application of § 481.126. Mere possession of monies in these circumstances is not a drug offense for federal purposes.

Further, it is clear that possession of drug-related proceeds as set forth in Texas' § 481.126(a)(1) is not a federal crime. Title 21 U.S.C. § 854 makes it unlawful for one who has received any income derived, directly of indirectly, from a violation of "this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year in which such person has participated as a principal within the meaning of section 2 of Title 18 to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce." The necessary predicate in this statute is involvement in interstate or foreign commerce.

3. Defendant Was Given No Notice That His Prior Conviction Would or Could Act As A Prior Drug Offense.

As noted in footnote 1, above, even assuming applicability of the statute to defendant, there is no applicable California State criminal or other code which would have put that defendant on notice that the Texas case required him to register as a narcotics

offender in California or that the Texas case would necessarily act as an aggravant if convicted in a subsequent drug case. This lack of notice started from the day he was allegedly placed on probation in Texas. The alleged "Terms and Conditions of Probation" (if believed) tellingly argue that this alleged conviction was *not* a drug offense. Docket 8, Exhibit 1 at pp. 6-8.

The Probation terms include the pre-printed standard violate no laws language regarding the Texas Controlled Substances or Dangerous Drugs Act that any grant of probation would have upon conviction of any offense. The terms advise not to introduce into the body intoxicants, including glue, paint, thinner, gasoline, cement, lacquer and commercial solvents. Nor can the probationer enter a liquor store or a store where it is solely sold. What is notable is what was *not* imposed:

- No drug testing;
- No drug programs for alcohol or drug abuse, or Alcoholics Anonymous or anit-abuse;
- No order that he submit his person, home, automobile to search by any probation officer; i.e., there was never as a condition of probation that defendant waive his Fourth Amendment rights against unreasonable search and seizure;
- No order that he register as a narcotics offender.

Defendant was further provided no notice when he was charged in Imperial County Superior Court in

1995 with various gun and drug paraphernalia offenses. PSR at paragraph 57, page 13. What was *not* charged was a failure to register as a narcotics offender. Presumably, if the Texas conviction was a violation of California law, a violation of California's Health and Safety Code § 11590 would have been charged.

A defendant must be advised as to what conduct is proscribed before punishment can be expected for violation of that conduct.

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926); Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618 (1939); Winters v. New York, 333 U.S. 507, 515, 68 S.Ct 665, 671 (1948).

Consequently, because defendant had no notice

and the Texas statute itself was ambiguous, a "felony drug offense" finding is not applicable in this case. Title 21 U.S.C. § 802(44) defines a felony drug offense as one "punishable by imprisonment for more than one year under any law of the United States or of a state or foreign country that prohibits or restricts conduct relating to narcotic drugs, marijuana, etc.."

Nor, for the reasons set forth above, could the Texas statute § 481.126 viewed in its entirety be viewed as a felony drug offense statute. Under a "categorical approach", the Court must "look only to the fact of conviction and the statutory definition of the prior offense." *Taylor v. United States, 495 U.S. 575, 602, 110 S.Ct. 2143 (1990).*

The Court must ask whether "the statute criminalizes conduct that would not constitute an aggravated felony under federal law." *United States v. Corona-Sanchez, 291 F.3d 1201, 1203-04 (9th Cir. 2002)(en banc); United States v. Navidad-Marcos, 367 F.3d 903, 906-908 (9th Cir. 2004).*

Texas Health and Safety Code § 481.126 covers conduct which would not be a felony under federal law. Therefore, it is not a felony drug offense.

4. <u>If There Is Any Ambiguity, The Rule Of Lenity Must Apply</u>.

In the event the Court determines that it cannot ascertain with certainty whether or not the Texas statute is a felony drug offense conviction of defendant, then

it must adopt the rule of lenity and find on behalf of defendant. "It may be fairly said to be a proposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620 (1955).*

5. Defendant Objects To The PSR's Factual Findings Regarding The Texas Case.

For the reasons provided above, defendant objects to the PSR's finding in paragraphs 35, 56, and 77 at pages 9, 12 and 18 that he was convicted of investing in possession of over 50 pounds of marijuana. As noted above, these alleged facts are taken from the Texas documents which defendant has objected to and argued do not show the actual state of the record. [7]

* * *

DATED: May 6, 2007

Respectfully Submitted
/s/ Philip A. DeMassa
PHILIP A. DeMASSA
ATTY FOR DEFENDANT
TODD ANTHONY HERNANDEZ

---

7. The government cited *United States v. Rinard, 956 F.2d 85 (5th Cir. 1992)* as further authority for its argument. Although Rinard argued the same ambiguity (which is clearly evident in the present case), he admitted in his PSR the existence of the factual predicate necessary to establish a drug offense prior felony. *956 F.2d at 88.* In contrast, defendant Hernandez does *not* admit the Texas conduct was a drug prior either legally or factually.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	) CRIM. NO. 05-0196 SOM
Plaintiff,	) DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO
v.	) DEFENDANT'S SUPPLEMENT TO
TODD ANTHONY HERNANDEZ,	) OBJECTIONS TO PRESENTENCE REPORT, ETC.
Defendant.	)

DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S SUPPLEMENT TO OBJECTIONS TO PRESENTENCE REPORT, ETC.

Defendant Todd Anthony Hernandez, by and through his attorney Philip A. DeMassa, of Philip A. DeMassa APC, files the enclosed Reply to Government's Response to Defendant's Supplement to Objections to Presentence Report, etc. ("Reply"). Defendant on May 6, 2007 filed his Supplement to Objections to Presentence Report, Objections to Statutory Enhancement, etc.

("Supplement").

I

THE GOVERNMENT CANNOT PRODUCE RELIABLE, ADMISSIBLE EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS CONVICTED IN TEXAS OF A "DRUG OFFENSE"

On May 25, 2007 the government filed it Response Defendant's Supplement to Objections to Presentence Report, Objection to Statutory Enhancement, and Motion for Downward Departure ("Response"). Defendant submits the enclosed Reply to the government's Response. [8]

The government cites *United States v. Cruz, 882 F.2d 922 (5th Cir. 1989)* and *United States v. Rinard, 956 F.2d 85 (5th Cir. 1992)* as dispositively establishing defendant was convicted of the drug felony "illegal investment". As noted in defendant's Supplement, these Fifth Circuit cases are inapposite because they only deal with Texas Health and Safety Code § 481.126(a)(2) and do not address its

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8. The government objects to the manner in which defendant has raised his objections, claiming that he failed to file a "written response". Response at p. 3. The words used are not dispositive. Section 851 allows the government to amend clerical mistakes at any time. Although defendant has not used the words "written response", it is clear he has made specific factual and legal objections to the imposition of the enhancement.

subdivision (a)(1). Saying it is so does not make it so.[9]

The government bears the burden of proof beyond a reasonable doubt on any issue of fact. 21 U.S.C. § 851©-1) . As noted, the government cannot sustain its burden of proof beyond a reasonable doubt that the Texas conviction is a drug felony.

Assuming the Court admits the government's proffered documents, it is unclear from the documents themselves whether defendant was found guilty after a jury trial of conduct which could arguably be considered a "drug offense" or whether he pleaded guilty to a generic "illegal investment" statute. As the Court is aware, defendant denies being convicted by jury.

If the Court determines from the paucity of proffered evidence that defendant was convicted by jury, the record is insufficient and unreliable to determine a conviction for a "drug offense." In

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9. Even if the Fifth Circuit cases spoke to this issue, such does not mean that courts in this Circuit are obligated to follow the Fifth Circuit's interpretation. Courts in the Ninth Circuit have an independent obligation to determine how Texas state law is dealt with as a "matter of federal, Ninth Circuit law." *United States v. Sweeten, 933 F.2d 765, 771 fn. 1 (9th Cir. 1991)*[allowing the use of a copy of defendant's original signed guilty plea to support a copy of the indictment which used parallel language as part of the proof, among other issues, to establish a Texas conviction could be used to enhance a conviction pursuant to the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e).] This is clearly not defendant Hernandez' situation.

viewing the records for sentence enhancement purposes where a jury has made a determination, the Supreme Court has allowed the sentencing court to determine whether the statutory definition corresponds to the "generic" charge or the "charging paper and jury instructions actually required the jury to find all the elements of a generic [qualifying crime] in order to convict the defendant." *Taylor v. United States, 495 U.S. 575, 602, 110 S.Ct. 2143, 2160 (1990).*

If defendant's case was submitted to a jury, there is no evidence presented of jury instructions, proof which is required by the Supreme Court. Nor is there any evidence of the jury's factual findings. If the case were not submitted to a jury but considered by a judge at a court trial, the Supreme Court would consider as "closest analogs" a "bench-trial judge's formal rulings of law and findings of fact, and in pleaded cases they would be the statement of factual basis for the charge, Fed. .Rule Crim. Proc.11(a)(3), as shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard v. United States, 544 U.S. 13, 26, 125 S.Ct. 1254, 1259-60 (2005).* None of such evidence is provided by the government: there are no judge's formal rulings of law and findings of fact, no statement of the factual basis, or a written plea colloquy or plea agreement or any showing that defendant adopted any such findings of fact or conclusions of law. Therefore, there is insufficient proof of a "drug offense" conviction when the statute *sub judice* is not categorically a drug offense statute.

Further, the sentencing court cannot rely on the charging documents and a verdict form which relies solely on the charging instrument if the latter fails to reflect the actual facts found by the jury. "Without a verdict form verifying the jury's findings of the truthfulness of all of the requisite charging allegations, the instructions are indispensable." *United States v. Parker, 5 F.3d 1322, 1327 (9th Cir. 1993).* Jury instructions are "indispensable". When they are missing, some convictions which otherwise might qualify for enhancement purposes will not so count; "we can assume that the problem of lost or destroyed instructions will affect primarily older convictions rather than recent ones, the rule we adopt is consistent with the general sentencing principle that the passage of time should dilute-and not magnify-the effect of past conduct on punishment for present acts."*Id. at 1328.*

If the Court determines from the limited government evidence that defendant pleaded guilty to a Texas statute, the record is insufficient to establish the plea was to a qualifying "drug offense." Regarding the record being considered, "minute orders" do not contain a factual basis for a plea as confirmed by the defendant. *Shepard, supra, 544 U.S. at 26, 125 S.Ct. at 1259-60.* A minute order contains no facts and no indication it has even been shown to the defendant. *Id.; United States v. Diaz-Argueta, 447 F.3d 1167, 1169 (9th Cir. 2006).*

Documents "used to satisfy a modified-categorical analysis must meet a `rigorous standard'.

[citation omitted] Because the consequences of a sentence enhancement for a qualifying conviction are significant, we have noted that `"'might'" simply cannot be enough,' and `"neither the district court nor this court should be handed the task of reading between the lines..' [citation omitted] In short, the purpose of this modified categorical approach is to `determine if the record unequivocally establishes that the defendant was convicted of the generically defined crime, even if the statute defining the crime is overly inclusive.'" *United States v. Navidad-Marcos, 367 F.3d 903, 908 (9th Cir. 2004).*

An abstract of judgment, like the one offered here, is not sufficient to establish unequivocally that defendant was convicted of a drug felony. An abstract of judgment is not the judgment of conviction. Preparation of the abstract of criminal judgment is a clerical and not a judicial function. *Id. at 909.* Such a judgment fails to satisfy the "rigorous standard" required by *Taylor's* modified categorical approach and should not be used. *Id.*

Nor can the documents the government produced be considered reliable, even if they are uncontradicted. In a situation where it considered whether or not a charging document may be sufficient under *Shepard* to establish a prior crime of violence for purposes of a sentence enhancement, the Circuit rejected the government's argument that minute orders are to be considered as accurate, even in the absence of substantial evidence to the contrary. The Circuit found in an evidentiary setting requiring much less proof

from the government than is required here that its documents were insufficient:

> The questions is not whether the documents are admissible under general rules of evidence, but whether they are adequate to meet the government's evidentiary burden of clearly and unequivocally establishing the facts underlying a prior conviction as to justify the enhancement of a criminal sentence. As the Supreme Court noted when ruling that complaints and police reports could not be considered, the defendant was never asked if the information contained in the reports was true or accurately reflected his plea. For this same reason, a minute order cannot establish the factual elements underlying a plea to a prior offense.

United States v. Snellenberger, ____ *F.3d* ___ *(9th Cir. April 3, 1977, No. 06-50169)*)(2007 DJDAR 4424, 4425).

Here, the government is required to prove issues of fact beyond a reasonable doubt, a standard of proof much higher than the clear and unequivocal evidence standard which the Circuit found insufficient in *Snellenberger*.[10]

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10. The government argues that "it is too late" for defendant to complain about what happened (or not)

As previously argued, if the Court considers the government's evidence, it is clear the documents are internally inconsistent. While one document purports to show a jury verdict (Docket 8, Exh. 1 at pp. 3-4), other documents show a guilty plea. Docket 8, Exh. 1 at pp. 9-17. Equally significant is the government's argument regarding the citation in the offered documents that show the conviction was "Illegal Investment TPC 481.126." Docket 8, Exh. 1 at pp. 9, 12 and 15. It is obvious there is no such Texas penal code section. How does the government deal with an inconsistent/unreliable official record? By pretending it is not there. The government summarily note this is "an obvious clerical record by court personnel." Response at p.10, fn. 6. How did the government acquire the prescience to arrive at this finding? It clearly has no information why the document is wrong. To admit it is inaccurate or unreliable would be to admit defendant's argument; therefore, the only response is a guess that it was an obvious clerical error.

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in Texas and "too late" to contend the "illegal investment" finding was "not worthy of belief." Response at pp. 6-8. Defendant disagrees as he is entitled to contest the alleged conviction. If he were not allowed to do so, he would be powerless to prevent its application. Section 851 places the burden to produce evidence beyond a reasonable doubt upon the government. Defendant is entitled under the statute to contest the admissibility, reliability and meaning of any evidence. Where, as here, the government's evidence is internally *contradictory*, it would seem strange if defendant were required to accept such evidence without so much as pointing out and objecting to its obvious impropriety.

Thus, where, as here, there is ambiguity in the record as to what occurred, this is an appropriate circumstance to apply the rule of lenity. *Bifulco v. United States, 447 U.S. 381, 387, 100 S.Ct. 2247, 2252 (1980); Simpson v. United States, 435 U.S. 6, 14-15 (1978).*

The government argues that defendant actually pleaded guilty but "apparently declined to waive his right to a jury." The government then argues that consistent "with the foregoing Texas criminal procedure, a jury had to be impaneled and incriminatory evidence presented in some form in addition to his guilty plea." Response at p. 9. The government here has admitted that a guilty plea was taken and a jury did not consider the charges and render a factual judgment. This is precisely defendant's argument. In fact, if such a guilty plea were made, the government failed to provide the plea form, the colloquy with the court or any transcript of the proceedings, all evidentiary failings which highlight the government's failure to prove the conviction beyond a reasonable doubt.

CONCLUSION

The Court should find the government failed to produce evidence beyond a reasonable doubt that defendant has a prior drug felony. His sentence should not be enhanced nor the mandatory minimum doubled.

Dated: June 7, 2007

Respectfully submitted,
/s/ Philip A. DeMassa
Philip A. DeMassa
PHILIP A. DeMASSA APC
Attorney for Defendant
TODD ANTHONY HERNANDEZ

CERTIFICATE OF SERVICE

I hereby certify that, on the date(s) and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

Served electronically through CM/ECF:

AUSA Michael K. Kawahara

Mike.Kawahara@usdoj.gov June 7, 2007

/s/ Philip A. DeMassa

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	) CRIM NO. 05-0196SOM)
Plaintiff,	) SUPPLEMENTAL) NOTICE OF FILING OF
vs.	) ADDITIONAL) PLEADINGS AND
TODD ANTHONY HERNANDEZ,	) RECORDS FROM) DEFENDANT'S PRIOR) CONVICTION; EXHIBITS) "3a" & "3b"
Defendant.	)

SUPPLEMENTAL NOTICE OF FILING OF ADDITIONAL PLEADINGS AND RECORDS FROM DEFENDANT'S PRIOR CONVICTION

This Court has previously requested that the prosecution contact the Clerk's office of the District Court for El Paso County, Texas, to obtain all currently available pleadings and records from defendant's prior conviction (State of Texas v. Hernandez, File No. 60927-327, Case No. 900D07710).

Attached hereto as Exhibits "3a" and "3b" are true and correct copies of the currently-available pleadings and records which have been received from the District Court for El Paso County. Exhibit "3a" are copies of pleadings and records pertaining to the underlying conviction in 1991-93, and Exhibit "3b" are

pleadings and records pertaining to the subsequent probation revocation action in 1995-99. Each page of these Exhibits have been discretely numbered to assist in citing them at the sentencing hearing.

(A) Exhibit "3a" at pages 1 and 2 (Bill of Indictment).

(B) Exhibit "3a" at pages 3 and 4 (Appearance Bond).

(C) Exhibit "3a" at pages 5 and 6 (Judge on Jury Verdict of Guilty-Punishment Fixed by Jury-Probation Granted).

The original pleadings and records received from the District Court for El Paso County will be available at the next scheduled sentencing hearing for the Court and opposing counsel's examination so as to confirm foregoing.

DATED: Honolulu, Hawaii, July 23, 2007.

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

By /s/ Michael K. Kawahara
MICHAEL K. KAWAHARA
Assistant U.S. Attorney

* * *

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
327TH JUDICIAL DISTRICT

THE STATE OF TEXAS

vs. No. 60937-327

TODD A. HERNANDEZ

LADIES AND GENTLEMEN OF THE JURY:

After the attorneys have presented their summations, you will go to the jury room. You will then select one of your members, male or female, foreperson. It shall be your foreperson's duty to preside over your discussions of and deliberations upon your case, vote with you and, when you unanimously agree upon a verdict, to certify your verdict by signing the same as foreperson. You will have this charge with you in the jury room, and you shall refer to it for guidance during your deliberations.

I.

The defendant, TODD A. HERNANDEZ, stands charged by indictment with the offense of Illegal Investment, alleged to have been committed in El Paso County, Texas on or about the 31st day of August, 1990.

To these charges the defendant has entered his plea of guilty. He has persisted in entering his plea of guilty, notwithstanding that the court, as required by

law, has admonished him of the consequences. It plainly appearing to the court that the defendant is mentally competent, and that he makes this plea freely and voluntarily, his plea is by the court received. You are instructed to find the defendant guilty as charged in the indictment and assess his punishment.

2.

Attached to this charge are forms covering any verdict you may properly reach in this case. You shall return one verdict only, unless you recommend a probated sentence, in which case you will return a dual verdict. Your verdict, or verdicts, must be unanimous. After you have arrived at your verdict, or verdicts, your presiding juror shall sign the attached forms which states the verdict, or verdicts, you have reached. Then you will notify the bailiff.

You are the exclusives judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony; but you are bound to receive the law from the court as it is given to you in this charge, and you are bound to be governed thereby.

An individual adjudged guilty of illegal investment, a first degree felony shall be punished by confinement in the Texas Department of Criminal Justice, Institutional Division for any term of not more than ninety-nine (99) years or life, nor less than five (5), years. In addition to imprisonment an individual adjudged guilty of an illegal investment, a first degree felony, may be punished by a fine not less than

$ 50,000.00 or more than $ 1,000,000.00

3.

You will now assess the Defendant's punishment by confinement in the Texas Department of Criminal Justice, Institutional Division for any term not more than ninety-nine (99) years nor less than five (5) years, or life, and a fine not less than $ 50,000.00 or to exceed $1,000,000.00. (VERDICT FORM "A")

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentenced imposed or 15 years, which ever is less. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

4.

If the punishment assessed by you is ten (10) years or less than ten (10) years imprisonment in the Texas Department of Criminal Justice, Institutional Division, and you further find that the defendant has never been heretofore convicted of a felony in this state or any other state, you may, if you desire, recommend that imposition of the confinement be suspended and that the defendant be placed on probation by so stating in your verdict. [VERDICT FORM "A-1" (2)]

You are further instructed that if you recommend probation, the Court must, under the law, grant the defendant probation. The Court can impose any of the following conditions of probation but need not necessarily impose all of them and may add additional terms. That the probationer:

a. Commit no offense against the laws of this State or of any other State or of the United States;

b. Avoid injurious or vicious habits;

c. Avoid persons or places of disreputable or harmful character;

d. Report to the probation officer as directed by the Judge or probation officer and obey all rules and regulations of the probation department;

e. Permit the probation officer to visit him at his home or elsewhere;

f. Work faithfully at suitable employment as far as possible;

g. Remain within a specified place;

h. Pay the fine, if one be assessed, and all court costs and attorney's fees, if an attorney was appointed by the Court, whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the Court may determine;

i. Support his dependants;

j. Pay the sum of up to $ 40.00 per month

toward costs of his supervision; and

k. Participate in any community-based program ordered by the Court in any Court approved list of work projects (community service sites) as assigned by the probation officer;

Concerning your manner of deliberation:

A. In order to return a verdict, each juror must agree thereto.

B. Jurors have a duty to consult with one another to deliberate with a view of reaching an agreement, if it can be done, without violence to individual judgment.

C. Each juror must decide the case for themselves, but only after an impartial consideration of the evidence with their fellow jurors.

D. In the course of deliberations, a juror should not hesitate to re-examine his or her own views and change his or her opinion if convinced it is erroneous.

E. No juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of fellow jurors, or for the mere purpose of returning a verdict.

You shall not consider any offense other than the offense for which you have found the defendant guilty in determining his punishment.

In arriving at your verdict, it will not be proper to fix the same by lot, chance, or any other method than by a full, fair and free exercise of the opinion of the individual jurors under the evidence admitted before you.

These instructions are given to you because your conduct is subject to review, the same as that of the witnesses, parties, attorneys, and the Judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

If you want to communicate with the Court, explain what you want in writing and deliver your message, signed by your presiding juror, to the bailiff. He will then deliver your message to the Court. Do not orally explain to the bailiff.

/s/ Virgil Mulanax
VIRGIL MULANAX, Judge

IN THE DISTRICT COURT OF EL PASO
COUNTY, TEXAS
327TH JUDICIAL DISTRICT

THE STATE OF TEXAS

VS. NO. 60937-327

TODD A. HERNANDEZ

VERDICT FORM "A"

We the jury, having found the defendant guilty of the offense of Illegal Investment, as alleged in the indictment, assess his punishment at confinement in the Texas Department of Criminal Justice, Institutional Division for a period of 10. (Number of years or life).

We further assess a fine of $ 200,000.

Gracie Olivas
PRESIDING JUROR

VERDICT FORM "A-1"

We further find that the Defendant has never been heretofore convicted of a felony in this or any other state, and recommend that:

(1) _____ the confinement and fine be suspended and the defendant be placed upon adult probation, or

(2) _____ only the confinement be suspended (and that the fine not be suspended) and that defendant be placed upon adult probation.
(If this is your verdict, check either (1) or (2).

Gracie Olivas
PRESIDING JUROR

If we determine jail sentence and ask for suspension, what happens if the defendant violates any part of his probation? Does our sentence then come into effect?

Gracie Olivas
11/4/93
1:25 p.m.

* * *

We have reached a verdict.

/s/ Gracie Olivas

FILED
EDIE RUBALCABA
DISTRICT CLERK

NOV 4 3:37 PM '93
By /s/ [Illegible]
DEPUTY

11/4/93
2:40 P.M.

IN THE 327TH JUDICIAL DISTRICT COURT
EL PASO COUNTY, TEXAS

APPLICATION FOR PROBATION OF SENTENCE

THE STATE OF TEXAS

VS. 60927

TODD ANTHONY HERNANDEZ

TO THE HONORABLE JUDGE OF SAID COURT:

The Defendant hereby swears that he has never been convicted of a Felony in this or any other State, and asks the Court to submit to the jury this application for a Probated Sentence.

/s/ Todd A. Hernandez
DEFENDANT

Subscribed and sworn to before me this 3rd day of November, A.D. 1993.

/s/ [Illegible]
Deputy District Clerk

FINGERPRINTS OF DEFENDANT

IN THE 327TH JUDICIAL DISTRICT COURT
EL PASO COUNTY, TEXAS

THE STATE OF TEXAS

VS.

TODD ANTHONY HERNANDEZ

93 NOV 4 P3:05
NO. 60927
EDIE RUBALCABA
DISTRICT CLERK
BY: /s/ [Illegible]

ELECTION OF SENTENCING

Comes now the above-named DEFENDANT, prior to the voir-dire of the JURY, and makes this his election to be sentenced by the JURY.

/s/ Todd A. Hernandez
DEFENDANT

/s/ [Illegible]
ATTORNEY FOR DEFENDANT

11/3/93
DATE

MINUTES

CASE NUMBER:	CR 05-00196SOM
CASE NAME:	USA vs. Todd Anthony Hernandez
ATTYS FOR PLA:	Michael Kawahara
ATTYS FOR DEFT:	Philip A. DeMassa Anne Shimokawa(USPO)

JUDGE: Susan Oki Mollway REPORTER: Debra Chun

DATE: 8/23/2007 TIME: 1:30-1:40
1:50-3:00
3:22-4:45

COURT ACTION: EP: Sentencing to Counts 1 and 2 of the Indictment ; Defendant's Motion for Downward Departure; Defendant's Motion to Dismiss Indictment; Defendant's Motion Requesting Court to Invoke its Supervisory Powers to Set Aside Verdict and Dismiss the Indictment with Prejudice-

Defendant Todd Anthony Hernandez present and in custody.

Defendant submitted to the Court his Supplemental Declaration.

Discussion held.

Defendant to confer with Mr. DeMassa.

Defendant elects not to file his supplemental declaration, and his counsel will orally state his arguments, most of which were already raised in his previously filed papers.

Mr. DeMassa informed the Court what new issues are raised in the declaration- Government is prepared to go forward with this hearing.

Arguments.

Court files Defendant's supplemental declaration.

Defendant's Motion to Dismiss Indictment-Denied.

Defendant's Motion Requesting Court to Invoke its Supervisory Powers to Set Aside Verdict and Dismiss the Indictment with Prejudice-Denied.

Court to prepare the order.

Court adopts the PSR and the USPO'S recommendation, and they are placed under seal.

Defendant's Motion for Downward Departure-Granted.

Allocution by Defendant

ADJUDGED:

Imprisonment: 262 Months as to each of Counts 1 and

2, to run concurrently.

Supervised Release: 10 Years as to each of Counts 1 and 2, to run concurrently.

Special Assessment: $200.00 ($100 per count).

* * *

CONSTITUTION OF THE UNITED STATES OF AMERICA

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* * *

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law ands just compensation clauses. No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

UNITED STATES CODE ANNOTATED

* * *

TITLE 21 U.S.C.A.

§ 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

* * *

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this

section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

* * *

(e) Statute of Limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

* * *